IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Frank Jarvis Atwood, Petitioner, v. David Shinn, Respondent.	No. _____ **** CAPITAL CASE**** **Execution Date: June 8, 2022**

MOTION FOR ORDER AUTHORIZING DISTRICT COURT TO CONSIDER A SECOND OR SUCCESSIVE HABEAS PETITION BY A PRISONER IN STATE CUSTODY

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Pursuant to 28 U.S.C. § 2244(b)(3) and Circuit Rule 22-3, Mr. Atwood asks this Court for an order authorizing the district court to consider his second application for habeas corpus relief under 28 U.S.C. § 2254. Because this petition asserts claims that existed and were ripe at the time of the filing of the first petition, it is a "second or successive" petition generally subject to the provisions of § 2244(b). *United States v. Buenrostro,* 638 F.3d 720, 723-25 (9th Cir. 2011); *Gage v. Chappell,* 793 F.3d 1159 (9th Cir. 2015). Accordingly, Mr. Atwood is seeking this Court's authorization.

Section 2244(b)(3)(C) requires, for authorization, a mere prima facie showing that the petition satisfies § 2244(b)(2)'s requirements. Mr. Atwood's petition contains three claims. Two—a *Brady* claim and a freestanding actual innocence claim—meet the requirements on the face of § 2244(b)(2). The other, a claim that the sole aggravating factor is invalid, asserts innocence of the death penalty, and is thus subject to an equitable exception. None has been previously presented in any federal petition. The invalid aggravator claim was raised in state court, where the state trial court denied relief on June 22, 2020, finding the claim precluded, and the state supreme court denied review on May 4, 2021.

Procedural History

Following a jury trial, Petitioner Frank Jarvis Atwood was found

guilty of one count each of kidnapping and first-degree murder. The State sought the death penalty, and just one aggravating factor was found: under former A.R.S. §13-703(F)(1), that Mr. Atwood had previously been convicted of a sentence punishable in Arizona by life imprisonment or death. Finding no mitigating evidence sufficient to call for leniency, the court imposed a death sentence in May, 1987.

The Arizona Supreme Court affirmed Mr. Atwood's conviction and sentence. *State v. Atwood*, 171 Ariz. 576 (1992). Thereafter, Mr. Atwood filed a post-conviction petition. The state court denied all claims for relief on January 28, 1997. Mr. Atwood then filed a petition for writ of habeas corpus in United States District Court, pursuant to 28 U.S.C. § 2254. Habeas proceedings were temporarily stayed to allow Mr. Atwood to exhaust certain claims in a successive post-conviction petition in state court, which was denied on January 2, 2009. The District Court thereafter denied Mr. Atwood's habeas petition on January 27, 2014. *Atwood v. Ryan,* 2014 WL 289987 (D. Ariz. Jan. 27, 2014). The Ninth Circuit affirmed. *Atwood v. Ryan*, 870 F.3d 1033 (9th Cir. 2017).

Mr. Atwood then filed a pro se successive post-conviction notice and petition in state court on April 23, 2019, raising the issue he seeks to raise here regarding the invalidity of his sole aggravating factor. After the

appointment of counsel and filing of an amended petition, the state trial court denied relief on June 22, 2020, finding the claim precluded, and the state supreme court denied review on May 4, 2021.

Mr. Atwood filed another successive post-conviction notice on June 25, 2021, seeking to develop and present new evidence regarding the reliability of the sole physical evidence against Mr. Atwood, a paint sample taken from the bumper of his car. After counsel was appointed, a petition was filed on November 19, 2021. The petition was denied without an evidentiary hearing on February 2, 2022.

After securing an expedited briefing schedule from the Arizona Supreme Court based on representations about the timeline for the use of execution drugs as constrained by the state's execution protocol for lethal injection, on April 7, 2022, the state filed a motion for an execution warrant. On May 3, 2022, the Arizona Supreme Court issued the execution warrant, scheduling the execution for June 8, 2022.

Claim One (Invalid Aggravator): An Equitable Exception to the Successive Petition Bar Exists for Claims of Actual Innocence of the Death Penalty.

The Supreme Court long ago recognized an equitable exception to the judge-made rule barring successive habeas corpus petitions, to avoid a fundamental miscarriage of justice where a petitioner credibly asserts actual

innocence of the death penalty. *Sawyer v. Whitley,* 505 U.S. 333 (1992). "A claim of actual innocence of the death penalty would require a showing that one of the statutory aggravators or other requirements for the imposition of the death penalty had not been met." *Beaty v. Schriro*, 554 F.3d 780, 784 (9th Cir. 2009) (citing *Sawyer*). And ineligibility for the death penalty is assessed "under the applicable state law." *Sawyer,* 505 U.S. at 336. Thus, the claim asserted here—that the legal requirements under Arizona law of the sole aggravating factor were not established—would clearly fall under *Sawyer.* (Note this is distinct from the exception recognized three years later in *Schlup v. Delo,* 513 U.S. 298 (1995), which allowed filing an otherwise-barred second petition asserting a constitutional violation at trial upon a relatively lesser showing of actual innocence of the crime of conviction, as opposed to ineligibility for the death penalty).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), includes a provision, 2244(b), barring the filing of second or successive petitions except in very limited circumstances—a change in the law, or new facts that could not have been previously discovered through the exercise of diligence that prove actual innocence of the crime of conviction. These restrictions, including the diligence requirement, apply to all 2254 petitions—they do not specifically address capital cases. And while the

statute does provide a procedure for asserting innocence of the crime, it does not address how to raise a claim of innocence of the death penalty. It is silent on whether the equitable exception in *Sawyer* for innocence of the death penalty survived the statutory change, and neither the Supreme Court nor the Ninth Circuit has decided whether it did.

The Supreme Court has, however, recognized that equitable exceptions to *other* requirements for filing habeas petitions survived the advent of AEDPA. There is no reason to treat this one differently. "[E]quitable principles have traditionally governed the substantive law of habeas corpus," and federal courts will "not construe a statute to displace courts' traditional equitable authority absent the clearest command." *Holland v. Florida*, 560 U.S. 631, 646 (2010) (citing *Munaf v. Geren*, 553 U.S. 674, 693 (2008); *Miller v. French*, 530 U.S. 327, 340 (2000); *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979)) (internal quotation marks omitted). In *Holland*, the Supreme Court concluded that the traditional equitable tolling exception to a limitations period defense survived the passage of 28 U.S.C. § 2244(d), notwithstanding Congress's enactment of a statutory tolling provision for habeas corpus proceedings that did not include equitable tolling. 560 U.S. at 645. And in *McQuiggin v. Perkins*, 569 U.S. 383 (2013), the Court held that the miscarriage of justice exception itself

survived and could be applied as an equitable exception to a limitations period notwithstanding its absence in the AEDPA statutory framework as an exception. 569 U.S. at 393. AEDPA may have narrowed review in various substantive ways (e.g., codifying a strict time limit and restrictions on successive filings, limiting review of claims already adjudicated by state courts, and restricting the consideration of new evidence), but it did not alter the fundamental nature of habeas corpus, nor in any way alter the need for courts to have a "safety valve" for cases where the usual requirements would cause a serious miscarriage of justice.

To be sure, in *Gage,* the Ninth Circuit held that the court-made actual-innocence-of-the-crime gateway of *Schlup,* while persisting where AEDPA included no directly conflicting provision, did not supplant § 2244(b)'s requirements in a non-capital case. 793 F.3d 1159. But its decision was premised on the fact that § 2244(b) explicitly addresses the question of actual innocence of the crime and provides a procedure for asserting it as a basis for filing a second petition. *Id.* at 1168. AEDPA's procedure for asserting an actual innocence claim in a subsequent petition thus supplanted the prior judge-made procedure. But AEDPA does *not* provide a procedure for asserting an innocence-of-the-death-penalty claim—so there is no provision that could supplant *Sawyer.* It would make no sense to provide a

procedure for getting out of prison but not a procedure for preventing an unjustified execution.

Whether a government possesses the constitutional power to inflict a particular punishment goes to the very core of habeas corpus. *Webster v. Daniels*, 784 F.3d 1123, 1139 (7th Cir. 2015) ("[A] core purpose of habeas corpus is to prevent a custodian from inflicting an unconstitutional sentence."). Congress could have legislated the method for asserting the state lacked the power to inflict a death sentence in the face of procedural bars, but it did not. Thus, *Sawyer* survives, and the Court must hear Mr. Atwood's claim that he is innocent of the death penalty because no legally valid aggravator was established.

Claims Two and Three: Mr. Atwood's related claims under *Brady v. Maryland* and the Eighth and Fourteenth Amendments (actual innocence) satisfy § 2244(b)(2)'s diligence and innocence requirements.

For a claim in a second or successive petition not addressing actual innocence of the death penalty and not based on a change in the law, the petitioner must establish (1) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence, and (2) the facts underlying the claim, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would

have found the applicant guilty of the underlying offense. At this stage, the Court's task is not to decide whether, in fact, the claims can meet § 2244(b)(2)(B)'s substantive standards, but to assess whether there is "possible merit to warrant a fuller exploration by the district court." *Woratzeck v. Stewart,* 118 F.3d 648, 650 (9th Cir. 1997) (quoting *Bennett v. United States,* 118 F.3d 468, 469 (7th Cir. 1997); *see also Cooper v. Woodford,* 358 F.3d 1117, 1123 (9th Cir. 2004) (*en banc*) (on application to file successive petition, "We are not in a position fully to evaluate the strength of Cooper's *Brady* claim. Nor are we in a position to undertake the difficult task of evaluating the information derived from the *Brady* claim in light of the other evidence in the case . . . ."). Mr. Atwood's *Brady* and actual innocence claims satisfy both requirements.

Diligence:

This Court has recognized that "[g]iven the nature of *Brady* claims, petitioners often may not be at fault for failing to raise the claim in their first habeas petition." *United States v. Lopez,* 577 F.3d 1053, 1064 (9th Cir. 2009). Although a petitioner can run afoul of § 2244(b)(2)(B) if he omits a *Brady* claim from a prior petition he files after the State's withholding has come to light, *see, e.g., Gage,* 793 F.3d 1159, he comes squarely within its protection when the withheld information is made available to him only after

the first petition, and he presents it to the court expeditiously.

Here, as detailed in the proposed petition at 60-63, the *Brady* evidence—a memorandum by an FBI agent documenting an anonymous caller claiming to have seen the victim, Vicki Lynne Hoskinson, in a car not associated with Atwood, and highly likely to be the vehicle of the primary alternate suspect, Annette Fries, because the license plate number she gave was from the car belonging to Fries's next-door neighbor—was never provided to the defense, and was not discovered until the Arizona Attorney General's Office allowed Mr. Atwood's counsel to inspect its files in the summer of 2021, years after the litigation of his first federal habeas petition had concluded. Mr. Atwood had no way to know such a call had been received, and no way to discover it, as it existed only in the State's file. He thus, in the exercise of due diligence, could not have discovered it prior to the State's belated disclosure. This more than satisfies the requirement that he make a *prima facie* case to be permitted to file the petition.

As to the actual innocence claim (and further relevant to the *Brady* claim), while some of the information underlying this claim that the real killer was Annette Fries was previously available, its significance was not knowable until recently. The just-discovered *Brady* evidence recasts information previously known in a light that heightens its meaning

concerning innocence. Specifically, Mr. Atwood has known for some time that a key witness for the defense, who strongly implicated Annette Fries, had experienced bizarre acts of harassment following her testimony in a manner highly reminiscent of other revenge attacks known to have been committed by Fries's son. But until the withheld FBI memo was disclosed, it was not known that Fries was attempting to throw investigators off her trail *prior* to any witnesses giving public testimony—and in a way paralleling what her Fries's son would later use in his own, extensive and disturbing criminal machinations. The memo provided a missing link between the Frieses and not just the trial, but the crime itself.

Until that disclosure of that long-suppressed detail in 2021, it would not have given rise to a claim of actual innocence.

Innocence:

The actual innocence claim, as pled in the proposed petition, establishes the requisite showing of innocence to satisfy § 2244(b)(2)(B)'s requirement both for the innocence claim itself and for the *Brady* claim, because it makes it plain that Annette Fries, implicated in this case from the very outset though dropped as law enforcement lurched to a blinkered investigation bent on manufacturing a case against Mr. Atwood, kidnapped and killed Hoskinson. Moreover, the *Brady* evidence goes directly to the

core of the defense, rather than, for instance, simply impeaching involved officers. *Cf. Brown v. Muniz,* 889 F.3d 661, 675-76 (9th Cir. 2018) (*Brady* evidence that would have impeached officers in ways not related to their role in the case did not establish actual innocence for § 2244(b)(2)(B) purposes). This Court need not, however, determine at this stage whether Mr. Atwood has established by clear and convincing evidence that no reasonable juror would find him guilty; it need only determine whether Mr. Atwood has established a *prima facie* case to allow the claims to be fully developed and considered in the district court. The *Brady* and actual innocence claims require discovery and an evidentiary hearing to be fully explored, and this Court cannot competently judge their ultimate merit now. Rather, it must simply ask whether there is enough here to warrant a more thorough determination by the district court. There is.

Section 2244(b)(2)(B) requires examining the facts "in light of the evidence as a whole." *See Cooper,* 358 F.3d at 1122 (granting an application to file a successive petition and noting that "[o]nce a *Brady* violation has been established, a federal habeas court is required to evaluate all information in the case, not just information relevant to the *Brady* violation."). Notably, in *Cooper,* the evidence considered in finding § 2244(b)(2)(B) satisfied included not only the evidence known at trial, but

also additional declarations, some of which were submitted in the day and a half preceding the *en banc* court's granting of the motion. The evidence as a whole is detailed at length in the proposed petition, and firmly establishes that Annette Fries, not Frank Atwood, kidnapped and killed Vicki Lynn Hoskinson. It includes:

- A sighting of a woman on the evening of the disappearance at a local shopping mall with a young girl, whom the witness recognized as Hoskinson upon seeing her photo on TV that night. The clothing the witness described also matched the clothing Hoskinson was wearing that afternoon. Several other witnesses at the mall also reported seeing them that evening, based on a composite sketch, and being concerned about the way the woman was treating the girl. The composite sketch was quickly identified as closely resembling Annette Fries.
- An interview of Annette Fries by police where she gave shifting information about her whereabouts at the time of the disappearance and provided an alibi that was proven to be false when the man she claimed to be with, whom she claimed was her boyfriend, denied it and it was revealed that there was no romantic relationship, but rather that Fries had been harassing the man and his family so badly that three days before the disappearance, they had obtained an injunction

prohibiting her further harassment.

- Records establishing that five years earlier, Fries had been charged with conspiracy, attempted fraud, and attempted arson when she tried to enlist an acquaintance to burn down her trailer so she could collect insurance money, but the case against her was dismissed after a judge found she was not competent to stand trial, due to a serious mental illness.
- Several witnesses who saw a woman meeting Annette Fries's description in the days surrounding the disappearance driving a car very similar to Mr. Atwood's—a Datsun 280Z with blue and gold California plates—except that where Mr. Atwood's car was black, Fries's was brown. Several reported her behaving strangely, including at an elementary school. Multiple witnesses who had seen a car in association with the abduction had reported a brown car, not a black one.
- Several witnesses describing attempts by Fries or a woman matching her description to kidnap other children in the days surrounding the disappearance, as well as evidence that Fries had a history of inappropriate and sometimes violent behavior.
- Evidence that after testifying for the defense, Konnie Koger, the key

witness who first reported seeing Fries with Hoskinson at the mall on the evening of the disappearance, had experienced intimidation and harassment, including attacks on her family's horses and a dead animal carcass left on her car. Koger interpreted these acts as potential revenge for her testimony on Mr. Atwood's behalf.

- Evidence that Fries's adult son, Todd, who also had a history of disturbing behavior including *cruelty to animals*, is currently incarcerated for a series of attacks beginning in 2008: (1) he scattered motor oil, paint, feces, and packing peanuts at a home, piled *dead animal carcasses* by the front door, and spray painted swastikas and anti-Semitic graffiti in German, and with the same victims at a new location, he attempted to harm them with devices emitting chlorine gas in their yard, left graffiti, and *left dead rabbits and birds*; (2) with a different victim, he spread glue and acid on a woman's driveway and vehicle, and on another occasion vandalized her property with motor oil, feces, and *dead lizards*. In these attacks, Todd included the graffiti to try to make it look like the acts had been hate crimes or gang-related crimes, and also left at the scenes stolen driver's licenses to try to make it look like someone else had committed the attacks. The attacks appeared to be acts of *revenge*, as a book about how to get

revenge was found in his home, and both victims had complained about the work done by Todd's business at their homes. Following one of these attacks, a person who was almost certainly Todd made an anonymous call to the FBI and, pretending to be a woman, claimed "her" cousin was responsible for the attack, after the victims had threatened "her."

- A memorandum, withheld by the State until a summer 2021 file inspection, documenting an *anonymous call to the FBI* just two days after the disappearance from a woman claiming to have seen Hoskinson in a vehicle not associated with either Fries or Atwood. The caller gave a plate number – 3AM618 – which turned out to be the plate on the car owned by Annette Fries's next door neighbor, strongly suggesting the caller was Annette or Todd Fries, thus linking the Frieses to the crime and investigation far earlier than was previously known.
- A dearth of compelling physical evidence connecting Mr. Atwood to the crime.
- A timeline that makes it effectively impossible Mr. Atwood committed the crime *and* was in the places where witnesses saw him at the times they testified to.

As these facts clearly undercut the jury's finding of guilt, Mr. Atwood has made a sufficient showing of possible merit to warrant the district court to more fully explore his *Brady* and actual innocence claims.

Conclusion

"The unavailability of review for a certification decision counsels greater caution before denying an authorization than before granting one." *Moore v. United States*, 871 F.3d 72, 78 (1st Cir. 2017); *see also Evans-Garcia v. United States*, 744 F.3d 235, 239 (1st Cir. 2014) ("We are cognizant, too, that if we err in granting certification, ample opportunity for correcting that error will remain. Conversely, should we err in denying certification, [the applicant] will have no opportunity to appeal or seek rehearing en banc.").

Mr. Atwood's second petition asserts, in no uncertain terms, actual innocence of the death penalty, because it makes "a showing that one of the statutory aggravators or other requirements for the imposition of the death penalty had not been met." *Beaty v. Schriro*, 554 F.3d 780, 784 (9th Cir. 2009). Accordingly, although this claim does not fall within the statutory criteria for a second or successive petition on grounds of actual innocence of the underlying crime, it squarely falls within the equitable exception recognized in *Sawyer,* 505 U.S. 333, which must survive AEDPA's

enactment as to the successive petition bar.

It also asserts *Brady* and actual innocence claims that could not have been previously discovered through the exercise of due diligence, and demonstrates by clear and convincing evidence that in light of all the evidence—particularly the evidence that someone else killed Vicki Lynn Hoskinson and went to great lengths to throw investigators off the trail—no reasonable jury would have found him guilty of murder. Accordingly, this Court should authorize the district court to consider Mr. Atwood's petition.

Respectfully submitted: May 4, 2022

/s/ *Amy P. Knight*

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CERTIFICATE OF SERVICE

I certify that on May 4, 2022, I caused the foregoing motion to be filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the Appellate CM/ECF system. In addition, a copy of this application and proposed petition have been served on the respondent via email.

/s/ *Amy P. Knight*

RELEVANT STATE COURT ORDERS

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ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. CATHERINE M WOODS

CASE NO. CR014065-001
CR015397-001

DATE: June 22, 2020

STATE OF ARIZONA
Plaintiff/Respondent,

vs.

FRANK JARVIS ATWOOD
Defendant/Petitioner.

RULING

IN CHAMBERS RE: AMENDED PETITION FOR POST-CONVICTION RELIEF

Pending before the Court is Petitioner's Amended Petition for Post-Conviction Relief for the above-referenced cases. The Court has carefully reviewed and considered the Petitioner's Amended Petition for Post-Conviction Relief, the State's Response, the Petitioner's Reply and supplemental materials, and relevant portions of the record. For reasons that follow, the Court finds that Petitioner raises no colorable grounds for relief, there is no legitimate basis to hold an evidentiary hearing on any of the claims raised in the Amended Petition for Post-Conviction Relief, and all of the claims shall be summarily denied under Arizona Rules of Criminal Procedure, Rule 32.1.

In evaluating Petitioner's Amended Petition, the Court has applied the current version of Rule 32, which became effective on January 1, 2020 by Order of the Arizona Supreme Court. *See* Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). As prescribed by the Arizona Supreme Court, the current version of Rule 32 applies to all cases pending on the effective date, unless the court determines that "applying the rule or amendment would be infeasible or work an injustice." *Id.* It is not infeasible, nor would it work an injustice, to apply the current version of Rule 32 to this case. Therefore, the Court finds that the current version of Rule 32 applies and controls. In reaching this conclusion, the Court notes that the claims and arguments presented in the Amended Petition, filed on January 13, 2020, bear no resemblance to the claims Petitioner originally asserted when he filed his successive Notice of Post-Conviction Relief on April 23, 2019.

After he exhausted all of his of-right appeals, and after the State and Federal Courts considered and

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Law Clerk

rejected all of his prior efforts to overturn his conviction and sentence through two prior Rule 32 proceedings and a federal habeas corpus action, Petitioner now for the third time in this Court challenges his death sentence. He argues four separate grounds. The court finds that Petitioner has not stated a colorable claim for relief, he is not entitled to relief on any of the four grounds asserted, nor is he entitled to an evidentiary hearing on the matter.

For his first claim, Petitioner claims that the sentencing judge's finding of the A.R.S. § 13-703(F)(1) aggravating factor was legally erroneous, because the court at sentencing did not apply the "statutory elements test." The Court finds that this argument falls within the scope of Rule 32.1(a). The Court further finds that this argument is untimely and precluded. The argument was available to Petitioner on appeal following his sentencing. It was available during his first timely Rule 32 proceeding, which he filed in March 1993. The Court finds that this claim is precluded by Rule 32.2(a)(3) because it was available but waived in Petitioner's first Rule 32 proceeding, and no exception to preclusion applies. This claim is not the type that requires a defendant himself to make a knowing and voluntary waiver within the meaning of Rule 32.2(a)(3). The Court further finds that Petitioner has failed to provide sufficient reasons why this claim was not timely raised and why it should be considered now. Petitioner also failed to demonstrate that he raised this claim within a reasonable time of discovering a basis for it. The claim presents purely a legal issue, based upon statutory interpretation. There are no new arguments or material facts available now that were not available during his sentencing, appeal, and his prior efforts at Rule 32 post-conviction relief in this court.

In addition to preclusion under Rule 32.2(a)(3), the Court finds that this claim impliedly was considered and rejected by the Arizona Supreme Court during Petitioner's of-right appeal. The Arizona Supreme Court on appeal engaged in an independent review of the entire record and found that the State proved the (F)(1) aggravating factor beyond a reasonable doubt. Considering our State's developed case law on the issue of proving aggravating factors in capital cases, it is clear that the Arizona Supreme Court was acutely aware of the "statutory elements test," and that Court had regularly analyzed and applied the "statutory elements test" in the context of a separate and distinct aggravating factor under (F)(2). By implication, when the Arizona Supreme Court in this case did not apply the "statutory elements test" to determine whether the State proved the (F)(1) aggravating factor, the Supreme Court determined that the "statutory elements test" does not apply to the (F)(1) factor. For these reasons, this Court finds that Petitioner's claim of error concerning the "statutory elements test" is precluded by Rule 32.2(a)(2).

This Court also has assessed the legality of the sentence at the time it was imposed. The sentence as

imposed was not erroneous or unauthorized. The Court finds that this claim raises no colorable issue under Rule 32.1(c), (d), or (h). It shall be summarily dismissed. There is no basis to hold an evidentiary hearing.

For his second claim, Petitioner claims that the California conviction that served as the basis for his (F)(1) aggravating factor is unconstitutional, because the California court failed to elicit a factual basis at a change of plea hearing. The Court finds that this claim falls within Rule 32.1(a). Similar to his first claim, this claim is untimely and precluded by Rule 32.2(a)(3). All of the facts and the law applicable to this claim were available to Petitioner at the time of his sentencing, appeal, and prior rule 32 post-conviction proceedings. The Court finds that this claim is precluded by Rule 32.2(a)(3) because it was available but waived in Petitioner's first Rule 32 proceeding, and no exception to preclusion applies. This claim is not the type that requires a defendant himself to make a knowing and voluntary waiver within the meaning of Rule 32.2(a)(3). The Court further finds that Petitioner has failed to provide sufficient reasons why this claim was not timely raised and why it should be considered now. Petitioner also failed to demonstrate that he raised this claim within a reasonable time of discovering a basis for it. The are no new arguments or material facts available now that were not available during his sentencing, appeal, and his prior efforts at Rule 32 post-conviction relief in this court.

In addition, aside from being untimely and precluded by Rule 32.2(a)(3), the claim lacks legal merit. The record in the California court easily overcomes any technical deficiency in the colloquy during the change of plea hearing. The record easily establishes a factual basis to support Petitioner's conviction in the California court. Of note, Petitioner has failed to present any suggestion or evidence that his conviction in the California court has been overturned or vacated. The conviction in the California court served as a valid aggravating factor under (F)(1).

The Court finds that this claim presents no colorable issue and it shall be summarily dismissed. There is no basis to hold an evidentiary hearing.

For his third claim for relief, Petitioner claims that no reasonable sentencer would have imposed death, based upon mitigation evidence that he has developed many years after his sentencing. The Court finds that this claim falls outside of the current version of Rule 32.1(h) and it presents no colorable claim for relief. The Court further finds that applying the current version of Rule 32.1(h) is feasible and it accomplishes justice. However, even if this claim was cognizable under Rule 32.1(h), the Court would find that this claim is untimely and precluded. Petitioner has failed to provide sufficient reasons why he did not timely raise the claim after discovering its basis. Claims for relief under Rule 32.1(h) have been available to convicted defendants since

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Law Clerk

2000. The factual basis to support this claim of post-sentence mitigation evidence has been available to Petitioner since at least 2012. Petitioner has provided insufficient reasons as to why he waited for 8 years to bring this claim before the Court. Further, having considered Petitioner's proffered mitigation evidence, the Court finds that this evidence, when weighed against the other evidence of record in this case, falls exceedingly short of demonstrating by "clear and convincing evidence" that "no reasonable fact-finder would find the defendant eligible for the death penalty in an aggravation phase held pursuant to A.R.S. § 13-752."

The Court finds that this claim presents no colorable issue and it shall be summarily dismissed. There is no basis to hold an evidentiary hearing.

For his fourth claim, Petitioner argues that his death sentence is unconstitutional because, 33 years after sentencing, it still has not been carried out. The Court finds that for more than 30 years, from the time of his sentence until the 2018 conclusion of his most recent post-conviction proceedings, Petitioner actively has been engaged in appeals, multiple Rule 32 proceedings in this court, and federal habeas corpus proceedings in the federal courts. Petitioner fails to present sufficient reasons why he did not raise this claim in his prior Rule 32 proceedings in 2009, when he already had been incarcerated on death row for 25 years. The Court finds that his claim is subject to preclusion under Rule 32.4 and rule 32.1(a)(3).

The Court also finds that Petitioner's fourth claim does not present a colorable issue under Rule 32.1(c). The sentence imposed was authorized and it was lawful. It did not violate any provision of the Constitution of the United States or the state of Arizona at the time it was imposed, nor does the passage of time now make the sentence unconstitutional or unlawful. In addition, the duration of his time on death row does not present a colorable issue under Rule 32.1(e). The length of time Petitioner has been on death row while pursuing post-conviction claims in the Courts is not a "newly discovered material fact" that would change his sentence, within the meaning of Rule 32.1(e).

Based upon the foregoing and good cause appearing, the Court has determined that no remaining claim presents a material issue of fact or law that would entitle Petitioner to relief under Rule 32.

IT IS ORDERED denying relief on all grounds raised in the petition, and summarily dismissing the Petition.

/s/
HON. CATHERINE WOODS
(ID: 0f8ef424-221c-4402-9b3e-2ee49ab381cc)

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cc: Erin E. Duffy, Esq.
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TRACIE K. LINDEMAN
Clerk of the Court

May 4, 2021

RE: FRANK JARVIS ATWOOD v HON. WOODS/STATE
Arizona Supreme Court No. CR-20-0381-T/PC
Court of Appeals, Division Two No. 2 CA-CR 20-0188 PRPC
Pima County Superior Court No. CR015397
Pima County Superior Court No. CR014065

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 4, 2021, in regard to the above-referenced cause:

ORDERED: Petition for Review of Denial of Petition for Post-Conviction Relief = DENIED.

Justice Lopez and Justice Beene did not participate in the determination of this matter.

Tracie K. Lindeman, Clerk

TO:
Lacey Stover Gard
Natman Schaye
Sam Kooistra
Frank Jarvis Atwood, ADOC 062887, Arizona State Prison, Florence - Central Unit
Jeffrey P Handler, Clerk
Dale A Baich
Amy Armstrong
Michele Lawson
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